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JAN 27 1993

OFFICE OF THE SECRETARY

January 27, 1993

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

**Re: MM Docket No. 92-266 (Rate Regulation)
Comments of Caribbean Communications Corp.
d/b/a St. Thomas-St. John Cable TV**

Dear Ms. Searcy:

Enclosed herewith on behalf of Caribbean Communications Corp. d/b/a St. Thomas-St. John Cable TV ("St. Thomas-St. John"), is an original and four (4) copies of its "Comments" in the above-referenced proceeding.

Should any questions arise in connection with this matter, kindly communicate directly with the undersigned.

Respectfully submitted,

Howard J. Barr

Enclosures

rec'd 0+4

RECEIVED

JAN 27 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In Re	)	
	)	
IMPLEMENTATION OF THE CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992	)	**MM Docket No. 92-266**
	)	
RATE REGULATION	)	

**COMMENTS OF CARIBBEAN COMMUNICATIONS CORP.
D/B/A ST. THOMAS-ST. JOHN CABLE TV**

Caribbean Communications Corp. D/B/A St. Thomas-St. John Cable TV ("St. Thomas-St. John"), by counsel and pursuant to Section 1.415 of the Commission's Rules, hereby submits its Comments on the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.[1/]

I. EFFECTIVE COMPETITION ISSUES

The Commission seeks comment on what services qualify as "a multichannel video programming distributor." The term's definition is derived from the original Senate version.[2/] By stating that "multichannel video programming distributor means a person such as, but not limited to" Congress indicated its intent that the term "multichannel video program distributor" be broadly construed to include any entity involved in the provision of multiple channels of video programming, regardless of whether two

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[1/] Implementation of Sections 623, 612, and 622(c) of the Cable Consumer Protection and Competition Act of 1992 (NPRM), ___ FCC Rcd ____, FCC 92-544, released December 24, 1992. Comments are due on January 27, 1993, thus, these Comments are timely filed.

[2/] Conference Report No. 862, 102d Congress, 2d Sess. at p.58. See also Senate Report No. 92, 102d Congress, 1st Sess. at p.71.

or two hundred channels are provided.[3/] The Senate stated in the legislative history of the original S.12 that "[t]he term 'multichannel video program distributor' means a person who makes available for purchase, by subscribers or customers, multiple channels of video programming."[4/] Thus, telephone companies offering video dialtone or television stations offering multiplexed multichannel service should qualify as multichannel video programming distributors. St. Thomas-St. John agrees with the Commission's tentative conclusion that for purposes of the second and third effective competition tests, the subscribership of all alternative multichannel video programming distributors (other than the largest) should be added together.[5/]

II. BASIC TIER ISSUES

The Commission has questioned whether the 1992 Act establishes a basic tier buy through requirement, i.e., "whether it precludes the offering of video services completely a la carte and without subscription to the basic service tier."[6/] No. The 1992 Act simply requires that cable operators make a basic service tier available to their subscribers. It should be left to individual cable operators to decide whether, in addition to offering the basic service tier, they wish to offer video

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[3/] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385 ("1992 Act"), Section 602(12), 47 U.S.C. §531(12); Senate Report, supra, at 71.

[4/] Senate Report, supra, at p.71.

[5/] NPRM, supra, 92-544 at p.8.

[6/] NPRM, supra, FCC 92-544 at p.9.

services completely a la carte and without subscription to the basic service tier. The 1992 Act should not be interpreted as reducing the flexibility of cable operators to package their program offerings in a manner appealing to their subscribers.

III. RATE REGULATION

A. Jurisdictional Issues

The Commission has tentatively concluded that it has authority to regulate basic rates only where it has disallowed or revoked a franchise authority's certification and that it has no independent authority to regulate such rates.[7/] It questions, however, whether a broad reading of the 1992 Act grants it the authority to regulate basic rates even where a franchise authority has not sought certification.[8/] Its tentative conclusion is the better reasoned approach.

As the Commission notes, its alternate interpretation conflicts with specific language of the 1992 Act.[9/] Moreover, the 1992 Act's legislative history indicates an intent that the Commission, in general, be relieved or free from having to regulate basic rates in most instances. Indeed, Congress specifically rejected the original Senate version which provided for Commission regulation as a general proposition. Under this rejected version, franchise authorities could obtain jurisdiction upon written request if they adopted rules and regulations conforming

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7/ NPRM, supra, FCC 92-544 at p.11-12.

8/ NPRM, supra, FCC 92-544 at p.12.

9/ NPRM, supra, FCC 92-544 at p.12.

to the Commission's procedures.[10] Instead, the Conference Committee adopted the House version.[11] The House Report makes it clear that Section 623(a)(6)[12]

> specifies the scope of the FCC's authority to regulate basic cable rates in lieu of a franchising authority. The FCC may exercise regulatory authority with respect to basic cable rates _only_ in those instances where a franchising authority's certification has been disapproved or has been revoked and _only_ until the franchising authority has qualified to exercise that jurisdiction by filing a valid certification.[13]

The language in Section 623(b)[14] referred to by the Commission is merely a broad policy statement intended to govern the Commission's establishment of regulations and was not meant to confer upon it the authority to regulate basic rates in circumstances other than those enumerated in Section 623(a)(6).[15]

B. Basic Tier Price Issues

The Commission is correct in that no matter what regulatory approach it takes, it must not "create unintended limits on a cable operator's discretion to tier programming services, and, indirectly, on the continued growth of cable programming servic-

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[10] Senate Report, _supra_, at pp.73-74; Conference Report, _supra_, at pp.58-59.

[11] Conference Report, _supra_, at 58.

[12] 47 U.S.C. §543(a)(6).

[13] House Report No. 628, 102d Congress, 2d Sess. at p.81 (emphasis added).

[14] 47 U.S.C. §543(b).

[15] 47 U.S.C. §543(a)(6). _See_ Conference Report, _supra_, at p.62.

es."[16] The Commission questions the extent to which Congress intended a low priced basic service tier. Suffice it to say that Congress intended for the Commission to ensure that the rates for basic cable service are "reasonable."[17] The word "reasonable is defined as "[f]air, proper, just, moderate, suitable under the circumstances ... [n]ot immoderate or excessive, being synonymous with rational, honest, equitable, fair, suitable, moderate, tolerable.[18]

C. Benchmark Model of Rate Regulation

St. Thomas-St. John agrees with the Commission's tentative conclusion that it adopt a benchmark model of rate regulation rather than a cost-of-service alternative.[19] This will be easier to implement and less burdensome on all parties involved. St. Thomas-St. John also agrees that the cost-of-service model should be used as a secondary procedure for the justification of rates above the benchmark.[20] Mimicking competition is perhaps easier said than done, therefore, the Commission's rules must contain a mechanism that takes into account the economic and other conditions driving cable rates in particular markets.

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[16] NPRM, supra, FCC 92-544 at p.21.

[17] Section 623(b)(1); Conference Report, supra, at p.62.

[18] Black's Law Dictionary, Fifth Edition, p. 1138 (emphasis added).

[19] NPRM, supra, FCC 92-544 at p.22.

[20] Id.

The Commission's proposal to separate systems into classes based on specified variables and to then set them forth in a matrix or table is an appropriate one. In addition to the variables mentioned, the Commission should also consider franchise area population, subscribership, availability of local off air signals, in general, and network signals in particular, and whether the system is a stand alone or part of a multiple system operation. Multiple system operators can obtain economies of scale, not available to stand alone system operators, in many areas of their operations in addition to programming costs which can impact the cable system's pricing.[21/] The Commission must take care to recognize the vast differences that exist among and between cable systems despite the existence of facial similarities.

For example, due to its location and the fact that almost all necessities of life must be imported, including two of the three major television networks and the FOX network, the United States Virgin Islands are, and St. Thomas-St. John operates in, a high cost of living area.[22/] Additionally, not only must St. Thomas-St. John pay a 5% franchise fee, but it must pay a 4% gross receipts tax, a pro rata portion of the Public Services Commission's ("PSC") costs, as well as all costs involving PSC investigations of St. Thomas-St. John. Thus, to compare St.

[21/] NPRM, supra, FCC 92-544 at p.24.

[22/] The lack of off air programming contributes significantly to St. Thomas-St. John's costs.

Thomas-St. John to a cable system operating in a franchise area of comparable size that happens to be subject to effective competition (or any other "similar" cable system") does not necessarily involve a comparison of apples to apples and oranges to oranges. The maxim that "a cable system is a cable system is a cable system" is inapplicable. The Commission should not lose sight of the fact that the relevant market in the case of cable is the local market.[23/]

Because the relevant market in the case of cable is the local market, the establishment of a local service price index ("LSPI") may be appropriate.[24/] In addition to the components listed by the Commission, the index should include items such as housing, food, clothing, and insurance costs. Insurance costs would be an important component insofar as the Virgin Islands are concerned due to the annual threat of hurricanes. The Virgin Islands are designated as a high risk area for catastrophe as a result. For instance, in the year after hurricane Hugo, which devastated the islands and St. Thomas-St. John's cable system, St. Thomas-St. John's insurance costs rose 150%.[25/]

[23/] Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service (Cable Report), 5 FCC Rcd 4962, 4994 (1990).

[24/] NPRM, supra, FCC 92-544 at p.25.

[25/] St. Thomas-St. John spent a significant amount of money to rebuild its system after Hugo, constructing a state of the art system.

IV. FRANCHISE AUTHORITY CERTIFICATION

The Commission's proposal to adopt a standardized form certification, with space for the effective competition showing,[26/] though administratively efficient, is inappropriate and possibly unlawful. Not only should franchise authorities be required to supply the basis for their determinations concerning the lack of effective competition, but they should be required to supply the basis for each element of the certification at the same time of submission. Only then can the Commission make a reasoned decision on whether to allow or disallow the certification to go into effect.

Without the submission of information concerning the basis for the certification, the Commission will become nothing more than a rubber stamp in the certification process. Additionally, the use of a form certification conflicts with the Commission's tentative decision to base its certification decision on the submission by the franchise authority alone.[27/] Under its plan as proposed, the Commission will never have a basis for disallowing certification, since it will have little or no information that would prompt it to even consider disallowing certification.

Had Congress intended the Commission to rubber stamp certifications, it would not have granted the Commission the authority

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[26/] St. Thomas-St. John agrees with the Commission's tentative conclusion that franchise authorities must provide evidence of a lack of effective competition in the certification. NPRM, supra, FCC 92-544 at pp.12-13.

[27/] NPRM, supra, FCC 92-544 at p.16.

to disallow certifications; in such a case, it merely would have provided for self effectuating certifications and given cable operators and other interested parties post certification review rights. The Commission's proposed procedure will most likely result in a large number of unqualified franchise authorities seeking certification and, _a fortiori_, a greater number of petitions seeking reconsideration and/or revocation of franchise authority certifications. This will result in greater burdens on both cable system operators and the Commission, in contravention of Section 623(b)(2)(A).[28]

At a minimum, a franchise authority seeking certification should be required to: outline the regulations it intends to adopt and administer (or that may already be in place); describe its legal authority to adopt the regulations; describe the individuals who will administer the regulations, their qualifications, and other responsibilities that will actually or potentially detract from their ability to administer the regulations; and demonstrate that procedural laws and regulations provide a reasonable opportunity for the consideration of the views of interested parties. Moreover, since the franchise authority is certifying that it will take affirmative action in the future, i.e., "that it will adopt and administer regulations with respect to the rates subject to regulation under this section that are consistent with the regulations prescribed by the Commission

[28] 47 U.S.C. §543(b)(2)(A).

under subsection (b)"[29] the Commission should establish a date certain, subsequent to the filing of the certification, by when the franchise authority must have adopted such regulations and by when the franchise authority must supplement its certification outlining the regulations it has adopted.

Section 623(a)(3)(A)[30] of the 1992 Act requires that these regulations be consistent with the regulations prescribed by the Commission. A franchise authority's certification must be revoked if its regulations conflict or are inconsistent with the Commission's regulations. On the question of sanctions to be imposed concerning noncompliance with Section 623(a)(3(A),(B), or (C), the only proper remedy is to revoke a certificate if the event resulting in non-compliance would have resulted in a denial of the certification in the first instance; that is the only "appropriate relief." Section 623(a)(5).[31]

V. REGULATION OF RATES FOR INSTALLATION AND EQUIPMENT

A. Equipment

The Commission's tentative conclusion that Congress intended it to separate rates for equipment and installation from other basic tier rates fails to recognize that not all cable companies charge for equipment. St. Thomas-St. John, for example does not make such a charge. Though theoretically, an equipment charge is imbedded somewhere within the basic service rate, requiring cable

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[29] Section 623 (a)(3)(A), 47 U.S.C. §543 (a)(3)(A).

[30] 47 U.S.C. §543(a)(3)(A).

[31] 47 U.S.C. §543(a)(5).

systems to break the rate out will result in an increased burden on the system with no apparent benefit flowing to the consumer. The Commission should rethink its position on this issue.

St. Thomas-St. John falls into the quagmire of how to treat equipment that is used for the provision of both basic tier service and cable programming services. Its system is state of the art, employing addressable impulse converters that are used for receipt of the basic tier, cable programming services, pay-per-channel, and pay-per-view programming. The converters are also used for communications from the subscriber to the system. For example, a subscriber can order pay-per-view programming through the converter.

Different standards for determining the reasonableness of cost will result in added confusion for cable operators and subscribers alike, again without any discernable benefit. Since the cost is the same for each converter, regardless of whether the subscriber subscribes to cable programming services in addition to the basic service tier, only one standard should be applicable.

B. Installation

The Commission's proposal to require two installation rates, one for wired homes, the other for unwired homes, is ill conceived.[32] It also invites confusion for the cable system, subscribers, and regulators. Except during promotional periods, St. Thomas-St. John charges $50.00 per new installation. Of that,

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[32] NPRM, supra, FCC 92-544 at pp.38-39.

St. Thomas-St. John, which uses contractors to perform installations, incurs a fixed charge for the contractor of $42.50 for the first installation and $10.50 for each additional outlet.[33] Approximately 44% of St. Thomas-St. John's subcribers have additional outlets. On a new install, St. Thomas-St. John does not charge the subscriber for the installation of additional outlets. No justification exists for the establishment of two different rates.

Moreover, such a scheme could potentially limit the cable system's flexibility to develop and implement promotional offerings designed to attract new subscribers. St. Thomas-St. John often runs promotions, as do numerous other cable companies, in which the installation charge for the subscriber is greatly reduced and performed at a loss. Indeed, even in the case of a non-promotional installation, because of franchise fee, gross receipt tax requirements, and St. Thomas-St. John's decision not to charge for installation of additional outlets, the ultimate result is that St. Thomas-St. John charges less than its actual costs for installation.

The Commission recognizes this general practice in the industry and questions whether Congress' intent is to prohibit such promotional offerings.[34] Such a result is clearly at odds with the intent of the 1992 Act. Consumers benefit greatly from

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[33] St. Thomas-St. John must also pay a franchise fee and a gross receipts tax on monies received for installation.

[34] NPRM, supra, FCC 92-544 at p.39.

these, and other promotional offerings. They would likely be incensed, and hardly protected, by the loss of these offerings. As a general matter, the Commission should not adopt any regulations that restrict a cable operator's ability to engage in bona fide marketing and promotions of the cable system's offerings to both existing and potential subscribers.

Additionally, the Commission's plan does not account for legitimate charges made for the various types of reconnections and reauthorizations, including but not limited to reauthorization where service was terminated for non-payment, which may require a service trip depending upon the circumstances, reauthorization for a subscriber who has requested that his/her service be suspended during an extended absence, etc.[35/] Though a "simple computer entry" may be all that is necessary for a reconnection and reauthorization, significant clerical time, and therefore expense, is involved in a reauthorization or reconnection, regardless of whether new or additional wiring is involved. See infra. Moreover, as with an original install, none of the rates charged for a reconnection or reauthorization begins to cover St. Thomas-St. John's costs.

[35/] This is a not infrequent happenstance on the island since it has a large population of transient residents, so called "snowbirds." This, and other aspects of life and realities of doing business on the Virgin Islands outlined herein, make the Virgin Islands unique. It is a market not easily comparable to any other market.

C. **Additional outlets**

St. Thomas-St. John makes no charge for installation of additional outlets at the time of primary connection.[36] It does charge for installation of additional outlets requested after the primary installation. Despite the fact that St. Thomas-St. John incurs the same contractor's charge when performing intial installations, it charges a lesser rate for the installation of such outlets than ordinarily charged for the initial installation. Thus, additional outlet installations are always performed at a loss. Again, Congress could not have intended for the Commission to prohibit such promotional offerings. Subscribers have come to expect these and other promotional offerings periodically made by the cable system. Denial of such offerings on the grounds that they are prohibited by federal regulations will be unacceptable and will undoubtedly result in a new round of cable bashing. Additionally, when considering the cost of equipment for additional outlets, the Commission must factor in the cost of service to such outlets.

D. **Customer Changes**

Under the 1992 Act, customer changes are to be based on cost and are not to exceed nominal amounts when "effected solely by coded entry on a computer terminal or by other similarly simple method."[37] St. Thomas-St. John's is a state of the art system.

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[36] St. Thomas-St. John also installs FM service for free at the time of the primary connection. Receipt of FM service does not result in an additional cost to the subscriber.

[37] Section 623(b)(5)(c), 47 U.S.C. §543(b)(5)(c).

Changes can and are effected by coded entry on a computer terminal. The effectuation of such a change, however, still requires time and manpower.

These costs, however, are not easily subject to quantification. Thus, the Commission's proposal to base these charges on actual costs is contrary to the 1992 Act's intent. Adoption of the proposal would be ill advised. Additionally, to the extent these changes actually cost more than the charge imposed, the Commission could find itself in the position of requiring a higher rate than is presently charged. This certainly is not in the public interest.

A change in a subscriber's service involves four separate individuals: The customer service clerk who takes the subscriber's information and explains the ramifications of the change and then gives the information to a customer service representative on a form she is required to complete; a customer service representative who prepares a computer generated service order; a person from computer operations who goes into the computer and makes all necessary changes and any necessary cost pro rations; and then the file clerk who files the information. St. Thomas-St. John makes the same charge for a customer change as it does for a requested reauthorization.

These charges, as well as the charges imposed on the various types of reconnections and reauthorizations, are analogous to returned check charges ordinarily imposed by banks, which require similar clerical functions and entries, and are equally as legitimate. The Commission must take these factors into consideration when it determines the meaning of nominal amount.

E. Implementation and Enforcement

The Commission's initial interpretation of Section 623(b)(6)[38] is correct, when a rate increase comes within the 1992 Act's notice requirement, franchising authorities should be required to review the proposed rate increase and render a decision within the thirty day notice period provided for in the 1992 Act.[39] If no decision is rendered in that time period, the proposed increase should automatically become effective.[40]

In response to the Commission's proposed alternatives, first, the 1992 Act does not appear to grant the Commission the authority to require a greater notice period. Second, since a certificated franchise authority has certified that it has adequate personnel to administer the rate regulations, the Commission should not be concerned that this thirty day period will be insufficient for the franchise authority to consider the request and the views of interested parties. Moreover, since the Commission proposes to require cable operators to notify their subscribers of the proposed rate increase at the same time the franchise authority is notified, they too would have adequate notice of the proposed rate increase.

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[38] 47 U.S.C. §543(b)(6).

[39] NPRM, supra, FCC 92-544 at p.43.

[40] Id.

Additionally, a "reasonable opportunity to consider the views of interested parties" does not necessarily require the adoption of pleading cycles. Indeed, the Commission has determined that formal hearings on proposed rate increases or rate disputes should not be utilized.[41] The holding of a public meeting at which interested persons could vocalize their opinions presents just such a reasonable opportunity. To facilitate action on the request, the Commission should specify a minimum amount of information in support of the proposed increase that should accompany the notice. Properly formulated, this will reduce the need for the franchise authority to request additional information and will significantly reduce the amount of time needed to made a decision on the requested increase.

The Commission must assume that Congress considered the length of time that would be necessary to consider and act upon a rate increase request. Additionally, as the Commission itself has recognized, without strict deadlines, "a franchise authority could by inaction delay new services reaching the public and deny a reasonable price change which would be critical to an operator's ability to serve a community."[42] The adoption of strict deadlines, such as Congress has established here, may also be an important tool in preventing otherwise unqualified franchise authorities from seeking certification.

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[41] NPRM, supra, FCC 92-544 at p.44.

[42] NPRM, supra, FCC 92-544 at p.43.

The Commission questions whether certain price changes outside of the operator's control should not be deemed to be price increases subject to the 1992 Act's notice requirement and should be permitted to be passed through without regulatory oversight.[43] St. Thomas-St. John supports this proposal. St. Thomas-St. John, as do most operators in the industry, enters into programming contracts of several years or more in length. The agreements provide for yearly increases in the amounts St. Thomas-St. John must pay in order to receive the programming, necessitating rate increases if St. Thomas-St. John is to maintain its level of service.

Operators should be able to pass these increased costs through in an administratively efficient manner, i.e., without having to go through a potentially expensive and time consuming ratemaking proceeding. Accordingly, St. Thomas-St. John proposes that the Commission codify in its rules, the five percent (5%) rule of former §623(e)(1).[44] That section permitted cable operators to increase their otherwise regulated rates once per year by an amount not to exceed five percent without the approval of its franchising authority. Id.

Adoption of such a rule is consistent with the Act in that it will result in decreased burdens for cable operators and their franchise authorities. Both will have to bear significant costs if a ratemaking hearing or proceeding must be held each time the

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[43] NPRM, supra, FCC 92-544 at pp. 43-44.

[44] 47 U.S.C. §543(e)(1).

operator seeks a rate increase. Of course in the Virgin Islands, the PSC has every incentive to engage in a prolonged debate since it bears none of the costs of such a proceeding. The cost of such a proceeding will be foisted upon St. Thomas-St. John, despite the fact that it already pays a franchise fee, a pro rata portion of the PSC's costs, and a gross receipts tax. Indeed, the PSC's utility ratemaking proceedings have historically been exorbitant from a cost perspective. Furthermore, the PSC has traditionally engaged an off island consultant for these proceedings which further increases the cost of its ratemaking proceedings.[45/] The cost of suc proceedings will have to be factored into St. Thomas-St. John's rate base.

The Commission is well within its authority to adopt such a rule. The Conference Committee specifically amended §623(b)[46/] to ensure the Commission had a wide enough berth "to choose the best method of ensuring reasonable rates for the basic service tier ... and to simplify the regulatory process."[47/]

Franchise authorities should not be vested with the authority to establish rates in the event of a rate increase denial. Upon the denial of a rate increase, while a franchise authority

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[45/] Reliance on such outside consultants may also bear upon the legitimacy of franchise certifications since franchise authorities must certify that they have the personnel to administer the rate regulations. Indeed, St. Thomas-St. John is aware that a Washington, D.C. "consultant" is actively seeking to file certifications on behalf of franchise authorities. This clearly violates the spirit, if not the intent, of the law.

[46/] 47 U.S.C. §543(b).

[47/] Conference Report, supra, at p.82.

may suggest to the operator a rate it believes is reasonable in lieu of the rate proposed by the operator, it should not be allowed to unilaterally set the rate. Even though rates for the basic service tier are subject to regulatory oversight, the basic function of establishing a rate is and remains a business decision of the cable operator. The franchise authority should not be permitted to intrude on that process any more than absolutely necessary and should be limited to its basic oversight role.

In the event the franchise authority denies a requested rate increase, the former rate should remain in effect until either (1) a new rate is proposed by the operator and approved by the franchise authority or (2) review of the denial has been completed. Since denial of the proposed rate increase may "delay new services reaching the public and deny a reasonable price change which would be critical to an operator's ability to serve a community,"[48] review of a denied rate increase must be on an expedited basis. Jurisdiction to consider a denied rate increase, therefore, should rest with the Commission rather than state and local courts. State and local courts will generally be unfamiliar with the ratemaking process and will be ill equipped to issue decisions in an expeditious manner. The Commission on the other hand is an expert authority and is in a much better position to consider requests on an expedited basis.

The Commission undoubtedly has the authority to exercise jurisdiction over a rate regulation decision in the absence of

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[48] NPRM, supra, FCC 92-544 at p.43.

its disallowing or revoking a certification.[49] "Upon petition by a cable operator or other interested party, the Commission shall review the regulation of cable system rates by a franchising authority under this section."[50] Not only then, is the Commission permitted to consider a rate regulation decision, the 1992 Act mandates that it do so. Given the 1992 Act's requirements, it would be inconsistent, and possibly unlawful, for the Commission to pass off review of a rate regulation decision to the local courts.

VI. REGULATION OF CABLE PROGRAMMING SERVICES

The Commission seeks comment on the extent to which a tier consisting of different premium services could be subject to rate regulation.[51] Cable operators should be permitted the flexibility to package their premium channels, otherwise offered on a per channel basis, with a minimum of or no regulatory oversight. For example, if a system has three premium channels ordinarily offered on a per channel basis, it should be free to package these channels into a -- for lack of a better word, tier -- at a price less than the sum of the channels if purchased individually and to offer the package to its subscribers. While technically such a package may fit the definition of a cable programming service, no good reason exists for the Commission to impose its

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[49] NPRM, supra, FCC 92-544 at p.45.

[50] Section 623(b)(5), 47 U.S.C. §543(b)(5) (emphasis added).

[51] NPRM, supra, FCC 92-544 at p.49.

oversight.[52/] Again, as a general matter, the Commission should not restrict a cable operator's ability to engage in bona fide marketing and promotions of the cable system's offerings to both existing and potential subscribers. So long as the offerings are available to all, questions of discrimination between and among subscribers will not arise.

VII. GEOGRAPHICALLY UNIFORM RATE STRUCTURE

The Commission has tentatively concluded that the 1992 Act does not preclude the establishment of reasonable categories of service with separate rates and terms and conditions of service.[53/] This is appropriate. The Commission should distinguish between subscribers purchasing cable service for viewing in their homes and commercial entities that contract for cable service fitting their particular needs and interests. For example, the United States Virgin Islands, particularly St. Thomas, are a well known resort area. St. Thomas-St. John provides cable service to a number of resort hotels in its franchise area pursuant to individually negotiated bulk service contracts.

The 1992 Act was not intended to affect the arrangements made with such sophisticated entities. Rather, it was intended to protect the individual consumer who is not in a position to bargain with the cable operator. Operators such as St. Thomas-St. John should be permitted to continue to enter into individual

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[52/] The Commission is free to determine over what areas it will take enforcement action. Heckler v. Chaney, 470 U.S. 821, 832, 105 S.Ct. 1649, 1656, L.Ed.2d 714 (1985).

[53/] NPRM, supra, FCC 92-544 at p.56.

arrangements with establishments such as resort hotels, hospitals, etc. free from the uniform rate requirement.

The Commission should define the term "geographic area" to mean franchise area.[54] The legislative history resolves any ambiguity over its meaning:

> This provision is intended to prevent cable operators from having different rate structures in different parts of <u>one cable franchise</u>. This provision is also intended to prevent cable operators from dropping the rates in <u>one portion of a franchise area</u> to undercut a competitor temporarily.[55]

Thus, whether a cable system provides service in more than one franchise area is immaterial. More importantly, however, the term should not be defined to mean that separate cable operators serving separate franchise areas in one "geographic area" must have a uniform rate structure. Economies of neighboring jurisdictions can oftentimes be quite distinct. For example, just as Montgomery County, Maryland is considered to be more affluent and has a higher cost of living than neighboring Prince George's County, Maryland, St. Thomas and St. John are more affluent and have a higher cost of living than neighboring St. Croix. The Commission should not overlook these distinctions.

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[54] <u>NPRM</u>, <u>supra</u>, FCC 92-544 at p.57.

[55] Senate Report, <u>supra</u>, at p.76 (emphasis added). The Conference Agreement adopted the House language, however, it adopted the Senate's provision on uniform rate structure in lieu of the House provision governing the regulation of charges for pay-per-view and championship sporting events. Conference Report, <u>supra</u>, at p.65.

VIII. LEASED ACCESS

The Commission's rules need not address tier location, channel position, and time scheduling for leased access use. The marketplace should be allowed to drive these issues, much as it does with cable programming services. Had Congress intended for the Commission to establish such rules, it surely would have made such a mandate clear, much as it did with public, educational, and governmental access programming.[56] St. Thomas-St. John has traditionally placed such programming in its channel lineup commensurate with subscriber interest and demand. Cable operators should not be required to give favorable access to programming unless such access is warranted.

Again, cable operators must be given the flexibility to align and package their programming in a fashion that is appealing to its customers. Individual cable system operators are in the best position to make these determinations.

Additionally, St. Thomas-St. John notes that the 1984 Act is unchanged in that an operator may use any unused channel capacity designated pursuant to §612[57] until the use of such channel capacity is obtained, pursuant to a written agreement, by a person unaffiliated with the operator. No regulations should be adopted affecting a cable operator's ability to make use of such channels, particularly to the extent that such regulations could mandate a cable operator to remove programming it its contractu-

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[56] <u>See</u> §623(b)(7(A)(ii), 47 U.S.C. §543(b)(7)(A)(ii).

[57] 47 U.S.C. §532.